KAMALA D. HARRIS.
Attorney General of California
SUE MELTON BARTHOLOMEW
Supervising Deputy Attorney General
MELISSA BIEDERMAN, SBN.: 231961
Deputy Attorney General
Bureau of Medi-Cal Fraud & Elder Abuse
303 N. Glenoaks Blvd., Suite 900
Burbank, CA 91502-1148
Telephone: (818) 556-2901
Fax: (818) 556-2939
E-mail: Melissa.Biederman@doj.ca.gov

Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF VENTURA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, **v.** FRANK SANTOS, AKA FRANCISCO SANTOS (DOB) 2/12/1953) Defendant.	Case No.: 2012015861 **EVIDENCE CODE SECTION 402 MOTION IN LIMINE TO ADMIT VICTIM'S OUT-OF-COURT STATEMENTS** Date: October 17, 2012 Time: 8:30 a.m. Dept: 13

I. STATEMENT OF FACTS

On October 10, 2011, the defendant was working as a Certified Nursing Assistant (CNA) at Thousand Oaks Health Care Center in Ventura County. One of his duties early that morning was to care for a resident named Anthony B.

At that time, Anthony B., age eighty-five at the time of the incident at issue, had diagnoses which included congestive heart failure, high cholesterol, dementia, and a previous stroke.Nurses' notes show he was alert and oriented to self with confusion, pleasant and cooperative. He required extensive assistance for bed mobility, dressing, and transfers, including getting to the bathroom; however he required only limited assistance whenmoving around in his wheelchair and with personal hygiene. Although he was observed to have short-term memory

problems, he did not have any disorganized thoughts or inattention at the time anassessment, called a Minimum Data Set (MDS),was completed.

On the night in question, the People allege that the defendant tied Anthony B. to a wheelchair—against his will or without his consent—with a bedsheet and left him in that state for up to two hours. There are three sets of out-of-court statements made by the victim that the People either seek to introduce at trial or seek introduction with a limiting instruction to the jury that they are not being offered for the truth of the matter asserted:

1. According to eyewitnesses, while he was tied to the wheelchair on October 10, 2011, Anthony B. repeatedly asked to be untied and cried out, agitated and upset.

2. The next day, on a visit to his physical therapist, Anthony B. stated without prompting that he needed the therapist's help because he was tied the night before with a bedsheet and was embarrassed about being tied up. He also told a staff member at the facility that next day, again without prompting, "You are nice. You won't tie me up like that man with the moustache."

Anthony B's daughter visited him the day after that and, again without prompting; an upset Anthony B. stated that he had been tied up the night before.

3. Starting October 12, 2011, the facility conducted an internal investigation into the allegations of the defendant having tied Anthony B. to a wheelchair on October 10, 2011, and part of that investigation involved talking with Anthony B., who told interviewers he felt humiliated and like his dignity had been taken away.As a result of talking with him, the defendant, and eyewitnesses, they ultimately sought to terminate the defendant's employment (he resigned in anticipation of firing).

It should be noted that the People seek admission of these statements for two reasons: an element of the People's case is that the restraint was placed without Anthony B's consent or against his will and due to Anthony B's declining mental health; he will be unavailable to testify at trial.

II. ARGUMENT

The hearsay rule, found in Evidence Code section 1200 (2012) states that statements made

out of court and offered for the truth of the matter asserted are inadmissible hearsay; however, there are exceptions.

A. Statements made while Anthony B. was tied to the wheelchair

The People seek introduction of statements made spontaneously while Anthony B. was tied to the wheelchair. Evidence Code section 1240 states that spontaneous statements are arguably admissible if they (a) purport to narrate, describe, or explain an act, condition, or event perceived by the Declarant; and (b) were made spontaneously while the Declarant was under the stress of excitement caused by such perception. California Evidence Code (2012). According to eyewitness Sharon Ozorio, Anthony B. stated, after being tied for about an hour and upon seeing the defendant asleep at the nurses' station, "Oh, why is he sleeping and why am I in this chair." Another eyewitness, John Briones, saw Anthony B. tied to the wheelchair and heard him asking for help, and asking for someone to help untie him. Nina Singleton, a third eyewitness, observed Anthony B. tied to the wheelchair; he gestured for her to come over and stated in an urgent whisper to be untied as "he has me tied up and I want to go to bed."

According to the Supreme Court in Crawford v. Washington (2004) 541 U.S. 36, 51, "not all hearsay implicates the Sixth Amendment's core concerns." Moreover, "where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law…." Crawford v. Washington*supra*, 541 U.S. 36 at 68. In California, out-of-court statements that qualify as spontaneous statements under Evidence Code section 1240 and are made to a civilian "unconnected to law enforcement" and under circumstances in which the Declarant "could not reasonably anticipate they would be used in court," are not testimonial under Crawford, and therefore use of those statements against defendant at trial did not violate the Sixth Amendment.People v. Rincon (2005, Cal App 2d Dist) 129 Cal App 4th 738, 757;*review denied*(2005) 2005 Cal. LEXIS 9193.

One important factor in determining spontaneity is the time which has elapsed between the perceived event and the statement that was made. People v. Garcia, 178 Cal. App. 3d 814, 820-21 (1986): "[A] spontaneous statement must be made under the immediate influence of the event so

as to negate any probability of reflection or fabrication." *Id*., at 820, *citation omitted*. "In general, the closer in time the declaration is to the event to which it refers the less likely it is to be the product of reflection and fabrication."

The statements made by Anthony B. on October 10, 2011, were made at the time he was tied up and therefore simultaneous to the event upon which he was commenting. There was no opportunity for "reflection and fabrication." Anthony B's present incompetence to testify at trial is not a bar to admission of the statements, either, as Evidence Code section 1240 does not require showing the Declarant was competent when the statement was made. "The spontaneity of the declarations lend credibility to the exclamations of a hearsay Declarant who might otherwise be incompetent, due to minority or other valid reasons, to testify at trial" In re Nemis M. (1996), 50 Cal App. 4th 1344, 1353, n8.

B. Statements made the next day and the two days after

The People also seek admission of two statements made the following day and one made two days later, to Anthony B's physical therapist and another CNA, and to his daughter, respectively. Neither is testimonial or made in anticipation of litigation; indeed, neither was as the result of any questioning or prompting by the listener. In each instance, Anthony B. was observed to be quite upset when he blurted out his statements and feelings about being tied up the night before. Applying the same test for spontaneity as was applied in subheading A, *supra*, to the statements Anthony B. made on the night he was tied to the wheelchair, it is clear that Anthony B. was still under the "immediate influence" of the event, still quite upset. Upon entering the room with the physical therapist, Anthony B. immediately reported what had happened to him and stated that the event had left him embarrassed. And that same day he told CNA, Maria Varela, that "you are nice. You won't tie me up like the man with the moustache."

When talking to his daughter two days later, Anthony B. was still visibly upset and told his daughter that the man who was assigned to help him on October 10, 2011 (the defendant) had tied him up.

Courts have consistently held that the passage of time alone does not determine the spontaneity of out-of-court statements if the declarant was still under the stress or excitement of the incident and even if the passage of time might have given the declarant time to reflect on his or her statements. In re Emilye A. (1992) 9Cal. App. 4th 1695, 1714 (statements made one two days after an incident admissible as spontaneous statements); People v. Raley (1992) 2 C.4th 870-893-94 (statements about a sexual assault made eighteen hours after the incident admissible as spontaneous statements); People v. Trimble (1992) 5 Cal. App. 4th 1225, 1234-35 (statements made two days after incident admissible as spontaneous statements).

It is clear from Anthony B's demeanor that he was still under the excitement and shock of the incident on October 10th in the following couple of days and that the statements made during that time are spontaneous statements within the meaning of Evidence Code section 1240.Showalter v. Western Pacific R.R. Co. (1940) 16 C2d 460, 468, *quoting* Wigmore on Evidence [2d Ed.], section 1750: "[I]n the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief"….[T]o render them admissible it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it."The statements made to the physical therapist and to the daughter are therefore admissible spontaneous statements.

C. Statements made during the facility's internal investigation

The People are offering the statements made to facility staff not for the truth of the matter but to prove that the statements were made and that they caused facility staff to further investigate the matter of Anthony B. allegedly being restrained two days before and are therefore not hearsay evidence. "'[O]ne important category of nonhearsay evidence--evidence of a declarant's statement that is offered to prove that the statement imparted certain information to the hearer and

that the hearer, believing such information to be true, acted in conformity with that belief. The statement is not hearsay, since it is the hearer's reaction to the statement that is the relevant fact sought to be proved, not the truth of the matter asserted in the statement.' " People v. Scalzi (1981) 126 Cal.App.3d 901, 907, *quoting* Jefferson, Cal. Evidence Benchbook (1978 Supp.), § 1.5, p. 21.

The court cannot rule that an out-of-court statement is admissible merely by identifying a non-hearsay purpose for the statement, however; it must also find that such purpose is relevant to an issue in dispute. People v. Turner (1994) 8 Cal. 4th 137, 189, *citing* People v. Armendariz (1984) 37 C3d 573,585.The relevance here applies to the two battery charges alleged in the complaint. Both battery charges require that the People prove a willful and unlawful touching done in a "harmful or offensive manner, ' even though only the feelings of such person are injured by the act. People v. Rocha (1971) 3 C3d 893-899-900, n12.

The evaluation of "harmful or offensive" must logically be based on a reasonable person standard, as one person's definition of or tolerance for "harmful or offensive" touching may differ from that of another. In order for the People to prove the "harmful and offensive" element of the battery charges they have alleged, the People need to introduce evidence of the facility's approach to restraints, the fact that the defendant was trained in said procedures, and that he willfully violated said procedures, producing an touching that was, by its nature, harmful or offensive to any reasonable resident as well as to the facility. The facts will show that, after interviewing Anthony B., and obtaining the statements the People seek to introduce, the facility determined that it needed to proceed to a full investigation because the restraints used by the defendant violated facility protocol and Anthony B's resident rights under California Code of Regulations Title 22 (2012) [Attachments A and B, respectively].

Admission of statements made to facility staff two days after the incident would require a limiting instruction from the court to the jury, to the effect that the statements made by Anthony B. during the facility's internal investigation are not to be considered for the truth of the matter asserted but may only be considered as the basis for what the facility did afterward.

III. CONCLUSION

For the foregoing reasons, the People seek admission of the various out-of-court statements of the victim, with applicable limiting instructions.

Dated: June 16, 2015

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California

_____
MELISSA BIEDERMAN
Deputy Attorney General
California Department of Justice